

Legal Mobilisation: Europe in Comparative Perspective

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Outline of topic

Debates about the role and power of law, legal actors and legal institutions in politics have been waged as long as political science has been a discipline. One of the key areas of enquiry in the literature on the role of 'things legal' in political systems and society concerns legal mobilization. The term embodies contested academic terrain as there is no sharply defined or universally accepted meaning. One of the earliest and most cited formulations put forth in the political science literature is that 'the law is... mobilized when a desire or want is translated into a demand as an assertion of rights' (Zemans 1983). In its narrowest applications the term refers to high-profile litigation efforts for (or against) policy and social change (McCann 1994; Rosenberg 2008). More broadly, it has been used to describe any type of process by which individual or collective actors invoke legal norms or discourse to influence policy or behaviour. While mapping who goes to court is an important part of studying legal mobilization, the impact of judicial decisions on public policies and social change has always been at the forefront of academic debate (McCann 1998; Rosenberg 2008; Songer et al. 2003). Studying legal mobilization and litigation is thus seen as part of the general puzzle of studying politics in terms of "who gets what, when, how" (Lasswell 1935).

While interest in the mobilization of law and legal norms has long featured in studies of American politics, in Europe, research on legal activity was long the exclusive remit of legal scholars. The subject was only of peripheral interest to political scientists. However, this has changed in recent years and there now exists within the discipline a flourishing body of research exploring legal mobilization in Europe. The growth of regulatory models of governance (Majone 1994; Kelemen 2011), increasing processes of legalization at both the state and supranational level (Anagnostou 2010; Bouwen and McCown 2006; Conant 2002), the rising influence of judicial institutions (Mattli and Slaughter 1998; Rothmayr 2001; Tate and Vallinder 1995), enhanced levels of access to justice (Cichowski 2007) and the growing prominence of "rights talk" among citizens, corporate firms and social movements (Gaïti and Israël 2003; Kelemen 2011; Vanhala 2009) suggest that legal mobilization research is moving to centre stage among scholars who study political processes in European national and supranational settings.

This ECPR Joint Session Workshop at Mainz in 2013 on *European Legal Mobilization in Comparative Perspective* will take stock of existing research, debate theoretical and methodological approaches to the study of legal mobilization and move the empirical research agenda forward. In order to develop a better theoretical understanding of the mechanisms at play in legal mobilization, the goal of this workshop is two-fold: 1) to empirically explore cross-national and cross-policy field variation in levels of legal mobilization activity, rates of success and resulting judicial and policy decisions beyond a single setting, and 2) to contribute to developing a

synthetic theoretical framework that accounts for both structural and contingent features that encourage or constrain legal mobilization activity and success.

Relation to Existing Research

Existing research on the mobilization of law by both individuals and groups seeks to explain the turn to courts and the conditions under which legal mobilization is likely to be successful, with many definitions of “success” deployed (Galanter 1974). Until recently, the legal mobilization literature was focused on the United States and (implicit or explicit) assumptions of national judicial exceptionalism: the belief that the American legal and regulatory style and heightened levels of rights consciousness are unparalleled elsewhere in the world (Kagan 1996). However, this perspective has come under challenge by those studying European nation-states, European integration and EU-enlargement (Cichowski 2006; Conant 2002; Kelemen 2006). The European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) offer additional judicial arenas for organized interests and citizens and this has shaped the study of legal mobilization in Europe (Alter and Vargas 2000; Anagnostou 2010; Chalmers 2000; Mattli and Slaughter 1998).

Legal mobilization research tends to focus on one of two explanatory dimensions (or, sometimes, a combination of both): agent-level attributes or the structuring environment. From a bottom-up perspective, actor resources (financial means, knowledge, staff) and organisational characteristics (such as identity, action frames and type of organization) are used to explain legal mobilization. Recent research drawing on network and policy-implementation theory suggests that being part of a subsystem of actors, with allies and adversaries, may influence the likelihood of turning to the courts in different ways (Andersen 2005; Della Porta and Diani 2006; McCann and Dudas 2006; Vanhala 2011). Questions about what sparks counter-legal mobilization and backlash in some policy areas but not others have also been raised. There are also important questions about why some agents perceive legal opportunities for influencing policy and others do not. Explanations based on the idea of “legal transplantation” and transnational diffusion of legal consciousness (Heyer 2002) might be helpful in resolving some of these problems.

In terms of the structuring environment, the literature has explored both legal and political contexts. From a legal point of view, procedural rules (such as who has standing to bring a legal case or whether class action suits are possible) as well as jurisprudence and substantive law are of relevance. Cross-national variation and changes over time in the “legal opportunity structure” (Andersen 2005; Hilson 2002; Kitschelt 1986; Vanhala 2012) have become the subject of recent focus and debate. Relatedly, differences in the power of highest courts in terms of judicial review and variation in legal cultures (for example in levels of trust of the judiciary) between the newer and older European democracies might also have explanatory power. Turning to research on the political context for legal mobilization, some have conceived of the courts as the preferred venue of the “politically disadvantaged” — those who do not succeed in realizing their goals of policy reform through “conventional” channels and forms, such as lobbying (Cortner 1968; Zackin 2008). Yet, we also know that litigation is not just a detour strategy and some agents use various policy-influencing tactics — lobbying, protest and litigation — in parallel (Andersen 2005; Bouwen and McCown 2006; Hilson 2002). Other areas of disagreement include questions of how these

political and legal contexts and strategies interact more generally. Is successful legal action and policy change a mutually reinforcing process because of feedback loops (Alter and Vargas 2000; Conant 2002; Stone Sweet and Brunell 1998)? What is the relationship between legal mobilization activity and policy agenda-setting processes? Litigation might be an effective strategy for “policy issue expansion” across institutional venues or it might divert resources from the most effective strategies and tactics. Another area of inquiry, rarely looked at, is the impact of changes (or continuity) in the composition of government (or in public opinion) on perceptions regarding the potential for successful legal mobilization.

The multiplicity of legal systems and institutions, on the national and EU level, form a unique socio-legal institutional context and offer many research puzzles regarding legal mobilization. The workshop will address the following theoretical and empirical questions about the phenomenon of legal mobilization in Europe: *Is increasing litigation and legal mobilization the result of fundamental changes in regulatory governance within the EU (Kelemen 2011) or the product of changes in the strategies of agents (Cichowski 2007; Evans Case and Givens 2010)? If the answer is a structural one, how can we explain variation across countries, policy areas and over time? More generally, how do legal mobilization processes interact with processes of European integration? Have the dynamics between civil society, courts and the construction of governance at the supranational level changed as a result of EU expansion? Is the process of European enlargement encouraging the spread of a European variant of adversarial legalism in the newer member states? Considering bottom-up dynamics, how do activists and lawyers decide which legal venues to target? How does the diffusion of rights across borders and oceans influence levels of legal mobilization activity? Why are some countries and policy fields more likely to engender legal challenges from citizens and collective actors than others? How have citizens and civil society groups responded to new legal opportunities? How can we best account for “negative cases” where we might expect legal mobilization activity but there is none (or only limited levels)? Why are some collective actors more successful in court than others? Have some actors more successfully influenced public policies through litigation strategies than others and, if so, why is that the case?*

Type of papers

Empirically-oriented comparative studies, which engage and challenge existing theoretical foundations are particularly welcomed. The overall aim of all papers should be to attempt to account for variation in legal mobilization activity and judicial policy-making across policy-fields or across countries. The goal is to identify and analyze patterns of legal mobilization and resulting judicial and policy decisions beyond a single setting in order to develop a better theoretical understanding of the mechanisms at play. The workshop welcomes qualitative as well as quantitative studies and is open to research from various epistemological points of view.

Biography of Workshop Directors

LISA VANHALA is a Lecturer in the Department of Political Science at University College London (United Kingdom). Her main areas of interest are: social movements, socio-legal theory and methods, comparative politics and public law and courts. Her first monograph *Making Rights a Reality? Disability Activists and Legal Mobilization* (Cambridge University Press) was published in 2011 and won the Socio-legal Studies Association and Hart Early Career Prize. She has published in *Journal of European Public Policy*, *Law and Society Review*, *Regional and Federal Studies* and *Studies in Law, Politics and Society*. She received her doctorate from the University of Oxford, UK.

CHRISTINE ROTHMAYR ALLISON is Associate Professor of Political Science at the University of Montreal (QC, Canada). Her two main fields of interest are: comparative public policy, focusing on the fields of biotechnology, biomedicine and higher education; and courts and politics, in particular, the impact of court decisions on public policy making in North-America and Europe. She has published articles in the *European Journal of Political Research*, *Comparative Political Studies*, and *West European Politics*. Before joining the University of Montreal, she taught at the University of Geneva, Switzerland. She received her PhD from the University of Zurich, Switzerland.

References

- Alter, Karen J. and Jeannette Vargans. 2000. "Explaining Variation in the Use of European Litigation Strategies." *Comparative Political Studies* 33(4):452-482.
- Anagnostou, Dia. 2010. "Does European human rights law matter? Implementation and domestic impact of Strasbourg Court judgments on minority-related policies." *The International Journal of Human Rights* 14(5):721 - 743.
- Andersen, Ellen Ann. 2006. *Out of the Closets and Into the Courts: Legal Opportunity Structures and Gay Rights Litigation*. Ann Arbor: Michigan University Press.
- Bouwen, Pieter and Margaret McCown. 2006. "Lobbying versus Litigation: Political and Legal Strategies of Interest Representation in the European Union." *Journal of European Public Policy*.
- Chalmers, Damian. 2000. "The Positioning of EU Judicial Politics within the United Kingdom." *West European Politics* 23:169-210.
- Cichowski, Rachel. 2007. *The European Court and Civil Society*. Cambridge: Cambridge University Press.
- Conant, Lisa. 2002. *Justice Contained: Law and Politics in the European Union*. Ithaca: Cornell University Press.
- Cortner, Richard C. 1968. "Strategies and Tactics of Litigants in Constitutional Cases." *Journal of Public Law* 17:287-307.
- della Porta, Donatella and Mario Diani. 2006. *Social Movements: An Introduction*. Malden: Blackwell.

- Evans Case, Rhonda and Terri E. Givens. "Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive." *JCMS: Journal of Common Market Studies* 48(2):221-241.
- Gaïti, Brigitte and Liora Israël. 2003. "Sur l'engagement du droit dans la construction des causes." *Politix* 16(62):17-30.
- Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9:95-160.
- Hilson, Chris. 2002. "New social movements: the role of legal opportunity." *Journal of European Public Policy* 9(2):238-255.
- Heyer, Katharina C. 2002. "The ADA on the Road: Disability Rights in Germany" *Law and Social Inquiry* 27(4): 723-762.
- Kagan, Robert A. 1996. "American Lawyers, Legal Culture, and Adversarial Legalism." In *Legal Culture and the Legal Profession*, eds. Lawrence M. Friedman and Harry N. Scheiber. Boulder: Westview Press, 7-51.
- Kelemen, R. Daniel. 2006. "Suing for Europe: Adversarial Legalism and European Governance." *Comparative Political Studies* 39(1):101-127.
- Kelemen, R. Daniel. 2011. *Eurolegalism: The Transformation of Law and Regulation in the European Union*. Cambridge: Harvard University Press.
- Kitschelt, Herbert. 1986. "Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies." *British Journal of Political Science* 16(1):57-85.
- Lasswell, Harold D. 1936. *Politics: How Gets What, When, How*. Cleveland: Meridian Books.
- Majone, Giandomenico. 1994. "The Rise of the Regulatory State in Europe " *West European Politics* 17(3):78-102.
- Mattli, Walter and Anne-Marie Slaughter. 1998. "Revisiting the European Court of Justice." *International Organization* 52(1):177-209.
- McCann, Michael. 1994. *Rights at Work. Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: Chicago University Press.
- McCann, Michael W. 1998. "Law and Political Struggles for Social Change: Puzzles, Paradoxes, and Promises in Future Research." In *Leveraging the Law. Using the Courts to Achieve Social Change*, ed. David A. Schultz. New York: Peter Lang, 319-349.
- McCann, Michael and Jeffrey Dudas. 2006. "Retrenchment....and Resurgence: Mapping the Changing Context of Movement Lawyering in the United States." In 37-59, eds. Austin Sarat and Stuart A. Scheingold, 37-59.
- Rosenberg, Gerald N. 2008. *The Hollow Hope: Can Courts Bring About Social Change?* 2nd edition. Chicago: University of Chicago Press.
- Rothmayr, Christine. 2001. Towards the Judicialisation of Swiss Politics? *West European Politics* 24(2), 77-94.
- Smith, Miriam. 2008. *Political Institutions and Lesbian and Gay Rights in the United States and Canada*. New York: Routledge.
- Songer, Donald, Reginald S. Sheehan and Susan Brodie Haire. 2003. "Do the "Haves Come Out Ahead over time?: Applying Galanter's Framework to Decisions of the U.S. Court of

- Appeals." In *Litigation: Do the "Haves" Still Come Out Ahead*, eds. Herbert M. Kritzer and Susan Silbey. Stanford: Stanford University Press.
- Stone Sweet, Alec. 2000. *Governing with Judges. Constitutional Politics in Europe*. Oxford: Oxford University Press.
- Stone Sweet, Alec and Thomas L. Brunell. 1998. "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community." *American Political Science Review* 92(1):63-81.
- Tate, Neal C. and Torbjörn Vallinder eds. 1995. *The Global Expansion of Judicial Power*. New York: New York University Press.
- Vanhala, Lisa. 2009. "Anti-discrimination Actors and the Use of Litigation Strategies" *Journal of European Public Policy*.
- Vanhala, Lisa. 2012. "Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK" *Law and Society Review* (forthcoming).
- Zackin, Emily. 2008. "Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to Courts." *Law & Society Review* 42(2):367-396.
- Zemans, Frances K. 1983 "Legal Mobilization: The Neglected Role of the Law in the Political System." *American Political Science Review* 77(3):690-703.